

Excerpts from the Magnuson-Stevens Act EFH Regulations (50 CFR 600.815(a)(2))  
and the Associated Preamble (67 FR 2354-2355; 1/17/02)  
[full text is available via <http://www.fakr.noaa.gov/frules/EFHFR.PDF>]

14. Comments on the Threshold that Requires Councils to Minimize Adverse Effects of Fishing on EFH

Comment A: One commenter questioned use of the words “prevent” and “mitigate” in the portion of the EFH regulations that states, “Councils must act to prevent, mitigate, or minimize any adverse effects from fishing, to the extent practicable...” The commenter indicated that use of these words is inappropriate since the Magnuson-Stevens Act only authorizes Councils to “minimize” adverse fishing effects on EFH.

Response A: NMFS disagrees. By using the words “prevent” and “mitigate” in this provision of the EFH regulations, NMFS’ intent is to give Councils the flexibility to adopt the approach that is most suitable to meet the statutory obligation to minimize adverse fishing effects on EFH. For instance, it might be more effective for Councils to act to prevent particularly damaging adverse effects rather than allowing all types of effects to occur with some degree of minimization.

Comment B: The interim final rule stated that Councils must minimize to the extent practicable adverse effects on EFH from fishing if there is evidence that a fishing practice is having an identifiable adverse effect on EFH. Some commenters from conservation groups were pleased that NMFS replaced the word “substantial” (from the proposed rule) with “identifiable,” stating that “identifiable” is closer to the intent of the statute in terms of indicating the threshold at which Councils must take action to minimize adverse fishing effects to EFH. Others expressed concern that the word “identifiable” is inappropriate since this language does not appear in the Magnuson-Stevens Act and may still raise the threshold for action above that set by the Act. Commenters also expressed concern that the need to demonstrate an “identifiable” adverse effect might lead the Councils to inaction. Furthermore, commenters questioned the meaning of the descriptors for the term “identifiable,” offered in both the preamble to the interim final rule and the draft technical guidance manual, that “identifiable means both more than minimal and not temporary in nature.” Some commenters recommended that the EFH regulations require Councils to demonstrate adverse impacts scientifically and make the specific connection between adverse impacts and reduced stock productivity before taking action to minimize these impacts.

Response B: As discussed in the preamble to the interim final rule at 62 FR 66538, NMFS’ intent was to provide guidance to Councils for determining when to act to minimize adverse fishing effects to EFH. Such action is warranted to regulate fishing activities that reduce the capacity of EFH to support managed species, not fishing activities that result in inconsequential changes to the habitat. In response to commenters’ concern over the word “identifiable” in the interim final rule, NMFS modified this section to read, “Councils must act to prevent, mitigate, or minimize any adverse effects from fishing, to the extent practicable, if there is evidence that a fishing activity adversely affects EFH in a manner that is more than minimal and not temporary in nature” based on the Councils’ evaluation of the potential adverse effects of fishing. Temporary impacts are those that are limited in duration and that allow the particular environment to recover without measurable impact. Minimal impacts are those that may result in relatively small changes in the affected environment and insignificant changes in ecological functions.

It is not appropriate to require definitive proof of a link between fishing impacts to EFH and reduced stock productivity before Councils can take action to minimize adverse fishing impacts to EFH to the extent practicable. Such a requirement would raise the threshold for action above that set by the Magnuson-Stevens Act. The final rule encourages Councils to use the best available science as well as other appropriate information sources when evaluating the impacts of fishing activities on EFH, and to consider different types of information according to its scientific rigor.

Comment C: Several conservation groups criticized Councils for not adopting any new measures to minimize adverse effects from fishing activities and requested that NMFS require in the EFH regulations that new measures be taken to comply with the Magnuson-Stevens Act. Many of the same groups commented that NMFS should develop documentation requirements for Councils to demonstrate compliance with the requirement to minimize adverse fishing impacts to EFH to the extent practicable.

Response C: The final rule clarifies that Councils should document compliance with the requirement to minimize to the extent practicable adverse effects on EFH caused by fishing. When there is evidence that a fishing activity adversely affects EFH in a manner that is more than minimal and not temporary in nature, Councils should identify in FMPs a range of potential new actions that could be taken to address adverse effects on EFH; include an analysis of the practicability of potential new actions; and adopt any new measures that are necessary and practicable. However, new measures may not be necessary in all cases. The final rule requires that FMPs explain the reasons for Councils’ conclusions regarding the past and/or new actions that minimize to the extent practicable the adverse effects of fishing on EFH.

Comment D: One commenter suggested that NMFS revise the EFH regulations to require Councils to adopt framework measures to address fishing impacts.

Response D: NMFS disagrees with this suggestion. It is not necessary or appropriate to add a requirement to the EFH regulations that Councils use framework measures as the mechanism to address fishing impacts. Rather, Councils should decide which administrative approach is most appropriate to use to meet the requirements of the EFH provisions.

Comment E: Several conservation groups recommended that each fishing activity be prohibited until it can be demonstrated that the activity does not adversely affect EFH.

Response E: NMFS disagrees. The approach suggested by the commenters would not be consistent with the statutory requirement to minimize adverse effects on EFH “to the extent practicable” and would have significant adverse socioeconomic impacts. The EFH provisions of the Magnuson-Stevens Act and the EFH regulations provide adequate mechanisms to evaluate the effects of fishing activities on EFH and ensure the minimization of adverse impacts on such habitat.

Comment F: Two commenters recommended that NMFS provide clearer guidance on how to interpret the term “practicable” and how Councils should carry out practicability analyses to comply with the statutory requirement to minimize to the extent practicable adverse effects on EFH caused by fishing. Another commenter noted that the phrase “consistent with national standard 7” in the section on conducting practicability analyses is unnecessary since all actions must be consistent with national standard 7 under the Magnuson-Stevens Act.

Response F: The final rule clarifies the guidance for considering practicability. The revised language eliminates redundancy and advises Councils to consider long- and short-term costs and benefits of potential management measures to EFH, associated fisheries, and the nation. The final rule retains a reference to national standard 7 to provide context for the consideration of the costs and benefits of potential management measures.

Comment G: One commenter requested that NMFS reinsert the words “the marine ecosystem” in place of “EFH” in the following passage from § 600.815(a)(3)(iv) of the interim final rule: “Councils should consider whether, and to what extent, the fishing activity is adversely impacting EFH...” The commenter stated that the language used in the proposed rule was a more accurate reflection of the spirit of the Magnuson-Stevens Act.

Response G: NMFS disagrees. The Magnuson-Stevens Act requires Councils to address the effects of fishing on EFH, not on the entire marine ecosystem. The final rule incorporates editorial changes to eliminate redundancy, and therefore omits language cited by the commenter. The cited paragraph appears at § 600.815(a)(2)(iii) of the final rule.

Comment H: One commenter suggested that the EFH regulations clarify that Councils must address the effects of fishing covered under one FMP on EFH covered under another FMP.

Response H: NMFS agrees. The final rule clarifies that each FMP must minimize to the extent practicable adverse effects from fishing on EFH, including EFH designated under other Federal FMPs. The final rule also clarifies that each FMP must contain an evaluation of the potential adverse effects of fishing on EFH designated under the FMP, including effects of each fishing activity regulated under the FMP or other Federal FMPs.

Comment I: Several commenters recommended that NMFS revise the EFH regulations to indicate what constitutes grounds for disapproval of the portion of FMPs pertaining to minimization of fishing impacts.

Response I: Disapproval is warranted if an FMP or amendment is not consistent with the national standards, other provisions of the Magnuson-Stevens Act, or other applicable law. The EFH regulations provide guidance on meeting the EFH requirements of the Act, and failure to follow the guidance may lead to disapproval or partial approval of an FMP or amendment. It is unnecessary to state the grounds for disapproval in the regulations.

Comment J: One commenter recommended that NMFS require Councils to coordinate with states and other authorities to provide conservation recommendations when Council-managed fisheries adversely affect EFH outside Federal jurisdiction.

Response J: The Magnuson-Stevens Act does not authorize NMFS to require Councils to coordinate with or provide recommendations to states or other authorities, although Councils have authority under the Act to provide recommendations to states regarding actions that may affect the habitat of species under Council jurisdiction. When Council-managed fisheries adversely affect EFH in state waters, the Council should coordinate with the affected state(s) when developing management strategies.

50 CFR 600.10

Definitions.

Essential fish habitat (EFH) means those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity. For the purpose of interpreting the definition of essential fish habitat: “Waters” include aquatic areas and their associated physical, chemical, and biological properties that are used by fish and may include aquatic areas historically used by fish where appropriate; “substrate” includes sediment, hard bottom, structures underlying the waters, and associated biological communities; “necessary” means the habitat required to support a sustainable fishery and the managed species’ contribution to a healthy ecosystem; and “spawning, breeding, feeding, or growth to maturity” covers a species’ full life cycle.

(2) Fishing activities that may adversely affect EFH--(i) Evaluation. Each FMP must contain an evaluation of the potential adverse effects of fishing on EFH designated under the FMP, including effects of each fishing activity regulated under the FMP or other Federal FMPs. This evaluation should consider the effects of each fishing activity on each type of habitat found within EFH. FMPs must describe each fishing activity, review and discuss all available relevant information (such as information regarding the intensity, extent, and frequency of any adverse effect on EFH; the type of habitat within EFH that may be affected adversely; and the habitat functions that may be disturbed), and provide conclusions regarding whether and how each fishing activity adversely affects EFH. The evaluation should also consider the cumulative effects of multiple fishing activities on EFH. The evaluation should list any past management actions that minimize potential adverse effects on EFH and describe the benefits of those actions to EFH. The evaluation should give special attention to adverse effects on habitat areas of particular concern and should identify for possible designation as habitat areas of particular concern any EFH that is particularly vulnerable to fishing activities. Additionally, the evaluation should consider the establishment of research closure areas or other measures to evaluate the impacts of fishing activities on EFH. In completing this evaluation, Councils should use the best scientific information available, as well as other appropriate information sources. Councils should consider different types of information according to its scientific rigor.

(ii) Minimizing adverse effects. Each FMP must minimize to the extent practicable adverse effects from fishing on EFH, including EFH designated under other Federal FMPs. Councils must act to prevent, mitigate, or minimize any adverse effects from fishing, to the extent practicable, if there is evidence that a fishing activity adversely affects EFH in a manner that is more than minimal and not temporary in nature, based on the evaluation conducted pursuant to paragraph (a)(2)(i) of this section and/or the cumulative impacts analysis conducted pursuant to paragraph (a)(5) of this section. In such cases, FMPs should identify a range of potential new actions that could be taken to address adverse effects on EFH, include an analysis of the practicability of potential new actions, and adopt any new measures that are necessary and practicable. Amendments to the FMP or to its implementing regulations must ensure that the FMP continues to minimize to the extent practicable adverse effects on EFH caused by fishing. FMPs must explain the reasons for the Council's conclusions regarding the past and/or new actions that minimize to the extent practicable the adverse effects of fishing on EFH.

(iii) Practicability. In determining whether it is practicable to minimize an adverse effect from fishing, Councils should consider the nature and extent of the adverse effect on EFH and the long and short-term costs and benefits of potential management measures to EFH, associated fisheries, and the nation, consistent with national standard 7. In determining whether management measures are practicable, Councils are not required to perform a formal cost/benefit analysis.

(iv) Options for managing adverse effects from fishing. Fishery management options may include, but are not limited to:

(A) Fishing equipment restrictions. These options may include, but are not limited to: seasonal and areal restrictions on the use of specified equipment, equipment modifications to allow escapement of particular species or particular life stages (e.g., juveniles), prohibitions on the use of explosives and chemicals, prohibitions on anchoring or setting equipment in sensitive areas, and prohibitions on fishing activities that cause significant damage to EFH.

(B) Time/area closures. These actions may include, but are not limited to: closing areas to all fishing or specific equipment types during spawning, migration, foraging, and nursery activities and designating zones for use as marine protected areas to limit adverse effects of fishing practices on certain vulnerable or rare areas/species/life stages, such as those areas designated as habitat areas of particular concern.

(C) Harvest limits. These actions may include, but are not limited to, limits on the take of species that provide structural habitat for other species assemblages or communities and limits on the take of prey species.